

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS ALBANESE,	§	
	§	No. 654, 2011
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court of
	§	the State of Delaware in and for
v.	§	Sussex County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0909016578
Appellee.	§	

Submitted: May 18, 2012

Decided: July 31, 2012

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

**O R D E R**

This 31<sup>st</sup> day of July 2012, upon consideration of the briefs of the parties and the Superior Court record, it appears to the Court that:

(1) The appellant, Thomas Albanese, filed this appeal from a corrected sentence imposed on November 17, 2011. We conclude there is no merit to the appeal and affirm.

(2) The trial court proceedings leading to the imposition of the corrected sentence are as follows. In April 2010, Albanese pled guilty to Driving under the Influence (hereinafter “DUI”) and was sentenced in June

2010 as a seven-time DUI offender (hereinafter “the 2010 sentence”).<sup>1</sup>

Albanese did not file an appeal.

(3) On September 21, 2011, Albanese filed a “motion for correction of illegal sentence or alternatively motion for reduction of sentence” pursuant to Superior Court Criminal Rule 35 (hereinafter “Rule 35 motion”). Albanese asked the Superior Court to vacate or reduce the 2010 sentence on the basis that he did not have the requisite prior DUI offenses qualifying him for sentencing as a seven-time offender. Albanese also alleged that his defense counsel (hereinafter “Defense Counsel”) was ineffective for having failed to recognize the Superior Court’s sentencing error.<sup>2</sup>

(4) By order dated October 4, 2011, the Superior Court denied the Rule 35 motion on the basis that the 2010 sentence was reasonable and appropriate. Moreover, the court advised Albanese that his allegations of ineffective assistance of counsel were not cognizable under Rule 35 and must be raised pursuant to Superior Court Criminal Rule 61 (hereinafter “Rule 61”).

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<sup>1</sup> Albanese was sentenced after a presentence investigation.

<sup>2</sup> The Court notes that without the sentencing transcript, which Albanese did not request as part of this appeal, the record does not reflect the parties’ positions or the procedures followed at the 2010 sentencing.

(5) On November 2, 2011, Albanese filed a motion for postconviction relief under Rule 61 (hereinafter “Rule 61 motion”) claiming that he was illegally sentenced as a seven-time DUI offender and that Defense Counsel was ineffective. On November 8, 2011, the Superior Court sent a two-page letter to Albanese in response to the Rule 61 motion.<sup>3</sup> The Superior Court informed Albanese that based on a further review it appeared that Albanese should have been sentenced as a six-time DUI offender.<sup>4</sup> The court therefore scheduled the matter for a “potential re-sentencing” hearing on November 17, 2011 and advised Albanese that he could inform the court on November 17 if he believed he should not be sentenced as a six-time DUI offender.

(6) Albanese was represented by Defense Counsel at the November 17, 2011 hearing and, at the suggestion of Defense Counsel, was given the opportunity to address the court. Neither Defense Counsel nor Albanese proffered any reason why Albanese should not be resentenced as a six-time DUI offender. Accordingly, the Superior Court sentenced Albanese as a six-time offender. This appeal followed.

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<sup>3</sup> The Superior Court sent a copy of the letter to Defense Counsel and to counsel for the State.

<sup>4</sup> Specifically, the Superior Court advised Albanese that it appeared that he had “convictions for [DUI] in 1985, 1989, 1992, plus [a] conviction under the First Offender election in 2004, followed by what would be considered as a single conviction for the 2005 and 2006 arrests.”

(7) Albanese complains on appeal that the Superior Court failed to sentence him in accordance with title 11, section 4215 of the Delaware Code.<sup>5</sup> Albanese's reliance on title 11, section 4215 is misplaced. For a DUI offense, sentencing is governed by title 21, section 4177 of the Delaware Code.<sup>6</sup>

(8) Albanese also claims that his claim of ineffective assistance of counsel in connection with the 2010 sentence should have disqualified Defense Counsel from representing him at the November 17, 2011 resentencing. According to Albanese, when analyzing his claim, this Court should view Defense Counsel's inherent "conflict of interest" as the constructive denial of counsel and apply the presumed-prejudice standard found in *United States v. Cronin*.<sup>7</sup>

(9) When a defendant alleges ineffective assistance of counsel arising from a conflict of interest, prejudice is presumed only if the defendant can demonstrate that an actual conflict of interest adversely affected counsel's performance.<sup>8</sup> In this case, Albanese has not demonstrated and the record does not reflect that Defense Counsel's

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<sup>5</sup> See Del. Code Ann. tit. 11, § 4215 (2007) (governing a sentence of greater punishment because of previous conviction under title 11).

<sup>6</sup> See Del. Code Ann. tit. 21, § 4177 (Supp. 2010) (governing DUI evidence, arrests and penalties).

<sup>7</sup> See *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (articulating three situations in which prejudice is presumed in an ineffective assistance of counsel claim).

<sup>8</sup> *Smith v. Robbins*, 528 U.S. 259, 287 (2000).

performance at the November 17, 2011 resentencing was adversely affected by Albanese's claim of ineffective assistance of counsel in connection with the 2010 sentence. To the extent Albanese argues otherwise, his claim is without merit.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely  
Justice